No. 14527

United States
COURT OF APPEALS
for the Ninth Circuit

WIEL AND AMUNDSEN, A/S,
as claimant of the SS ROMULUS,
Appellant,

vs.

ROY E. POTTER,
Appellee.

REPLY BRIEF OF APPELLANT

Appeal from the United States District Court for the District of Oregon.

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The contention made by Appellee in his brief can be summarized simply by saying Appellee claims the guard rail at the after end of the forepeak of the ROMULUS was provided for "people to hang onto", and it should have supported libelant *regardless* of what use he made of the guard rail. His argument applies both to his claim of unseaworthiness and negligence.

But this contention of Appellee can not be supported, either in the law or by the evidence in the case

at bar. The obligation of a shipowner, both factually and legally, is to provide a vessel with appurtenances which are adequate and safe *for the uses and purposes intended and anticipated.*

THE EVIDENCE

The only evidence concerning the purpose of the guard rail is that of Girt, the walking boss:

> "Q. . . . Could you tell the court from your experience what would be the purpose of this guard railing?
>
> A. It was for the purpose of protecting the men from falling off the forecastle when they were working there—I should say, sailors working there at sea; also when a man was walking along the forecastle, a longshoreman or sailor, to keep him from falling off the forecastle onto the main deck, in case they would fall sideways.
>
> Q. I think I am right when I say you testified the railing would serve that purpose.
>
> A. Yes." (R. 112)

The fact that this guard rail would serve its acknowledged function was nowhere contradicted by Appellee in the evidence. The only manner of dislodging the rail was by a direct upward pull (R. 107) and this is what Appellee did (R. 104).

Nowhere is there any testimony that this particular guard rail should be sufficient to support *any use* which could be made by Appellee. Nowhere is there any testimony that the manner of using the rail which was attempted by Appellee was to be expected or anticipated. In fact, the only evidence is to the contrary. No witness

had ever seen any longshoreman sidestepping along the after edge of the forepeak, holding onto the rail (R. 94, 95, 105, 106). And there is absolutely no evidence of a common practice, as suggested by Appellee's brief (pp. 5, 11).

Appellee relies only upon his own assumption that "This rail that I had hold of was supposed to be secured" (R. 47) and counsel's ingenious argument about the walking boss's statement concerning "walking the rails". Appellee urges that this phrase means walking along outside of a rail and claims it is a usual practice. A careful reading of the explanation of the walking boss (R. 113) disproves counsel's argument. Girt stated that "walking the rail" is to "walk *along* the edge of the ship, along the railing". This certainly does not mean "to walk outside" the rail. And even more significantly in answer to counsel's claim, is this testimony from Girt, while talking about this so-called "walking the rails":

> "Q. This rail would serve that purpose, would it not?
> A. Yes." (R. 113)

The facts concerning the issues of liability are not in conflict in the testimony, despite Appellee's valiant attempt to conjure up such a conflict (Appellee's Brief 4, 5). The plain facts are that there was no cotter key or pin in a hole found in the hook end of the rail by digging through many coats of paint, nor was some other device used to secure the hook end of the rail after it passed through the stanchion eye. Equally clear is the fact that the rail, without these devices claimed

by Appellee, was adequate and safe for its intended uses and purposes.

There is no evidence that the eye in the hook was placed there so that the rail would withstand such extraordinary use as that made by libelant. Of equal force as the argument made by Appellee is the argument that the purpose of the eye in the hook was to prevent the rail from becoming dislodged by heavy seas coming over the bow while the vessel was underway.

At page 7 of Appellee's Brief he seeks by hypothesis and without evidence to suggest that possibly the hook of the rail was partly out of the stanchion eye and was thereby rendered insecure. The court need only read the transcript reference suggested by Appellee to find that it does not support Appellee's theory.

Because the rail, in the condition it was aboard the ROMULUS at the time of Appellee's injury, was sufficient and adequate for all its intended uses and purposes, the vessel was not rendered unseaworthy nor were the owners negligent in not providing a cotter key or shaker or other device.

THE LAW

Nor does the law require a shipowner, in order to supply a seaworthy vessel, to supply on the vessel appurtenances which meet any and all demands whatsoever which may be made upon them. The shipowner's obligation is to supply appurtenances which are adequate for the purpose for which they are ordinarily

used. *Mahnich v. Southern S. S. Co.* (1943), 321 U.S. 96, 103. See also, *Vileski v. Pacific Atlantic S. S. Co.* (CCA 9, 1947), 163 F. (2d) 553; *Page v. U. S.* (CCA 9, 1949), 177 F. (2d) 601. This obligation was fully met by Appellant.

As to the claimed negligence of Appellant, no authority is given by Appellee in support of his theory.

In fact nowhere in Appellee's brief does he discuss the cases in point which were cited in Appellant's Brief (pp. 8, 9, 10), which cases stood for the proposition (directly contrary to that urged by Appellee) that an instrumentality properly used aboard a vessel for one purpose cannot be changed into an unseaworthy appurtenance nor render the owners negligent by reason of being improperly used for another purpose by libelant.

CONCLUSION

As supplemented by this Reply Brief, Appellant relies upon its opening brief to answer Appellee's Brief and to support its contention that the decree of the trial court should be reversed.

Respectfully submitted,

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